No. 05-1345

In The

Supreme Court of the United States

UNITED HAULERS ASSOCIATION INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* ROCKLAND COALITION FOR DEMOCRACY & FREEDOM, and the ROCKLAND COUNTY CONSERVATION ASSOCIATION

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BRIEF FOR *AMICUS CURIAE* FEDERATION OF NEW YORK SOLID WASTE ASSOCIATIONS IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF THE AMICUS CURIAE

This *amicus curiae* brief is submitted on behalf of the Federation of New York Solid Waste Associations (hereinafter "Federation"). The Federation of New York Solid Waste Associations was formed ten years ago. The Federation's primary purpose is to conduct conferences, seminars, and training as well as to provide a united voice,

when possible, for legislative and policy issues that are consistent with the environmentally sound management of solid waste. The Federation's membership consists of three state-wide organizations and their members, including individuals from both the public and the private sector.

Many of the Federation's members are public employees involved with the management and regulation of their communities' solid waste, including long-term planning for environmentally sound, economical, and sensible management of municipal solid waste. They are thus responsible to the public they serve.

The Federation's individual members, as citizens, are members of the taxpaying, trash-generating public. They request the Court to consider and accept the "Golden Rule" as applied to solid waste management:

> "the local community should accept responsibility for managing its own community's solid waste; if the private sector is needed, employ it on an even-handed and non-discriminatory basis; and if the local community needs to reach out to the interstate waste service providers, allow these to perform their services without unfair interference."

The *Amicus* believe that public-spirited citizens from all States will agree with this "do unto others" approach. Professionals such as the Federation's members seek the best solutions to solid waste problems. If Oneida-Herkimer's system becomes the model for successful waste reduction, recycling and disposal, the Nation will benefit.

Because this Court's decision could have a profound effect upon principles of democracy, federalism and the environment, the Federation urges affirmance.[1]

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[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* or its members has made a monetary contribution to the preparation or submission of this brief. The Petitioner and Respondent have each consented to the filing of this brief

RELEVANT FACTS

The people of Oneida and Herkimer counties, through the public respondents, have democratically chosen to monopolize the management and disposal of their own citizens' solid waste. The State of New York, through state legislation, has expressly authorized this monopoly system of public service, and the Respondent Authority is created for this public purpose. The Oneida-Herkimer system, boiled to its essence, is as follows:

1. All waste (unwanted material) placed curbside by the local public becomes the responsibility of the system, and the public system is entitled to control it. The waste is thus "bottled up" within the Respondents' public system of solid waste management (the "Oneida-Herkimer system"). *See,* "'Bottled' Solid Waste and its Flow " diagram" at *Appendix* "A".

2. The curbside solid waste is collected ("bottled") by private haulers who sell their waste collection services to the local citizenry individually. These haulers are required, however, to keep the waste they collect within the bottle—as the government controls its citizens' waste under its monopolistic waste management system.

- Essentially, the Oneida-Herkimer system gives the local haulers a non-exclusive franchise for the collection of local solid waste. The Respondents could have used direct municipal collection with DPW sanitation trucks, or competitively awarded an exclusive franchisee for such trash collection within the public system area, or provide for free disposal for citizens' wastes. As shown in the annexed diagram, regardless of the form used—regulatory flow control, municipal collection, contract, exclusive franchise or "economic flow control"—the net result is that the local waste is controlled within the system, and

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and their respective letters of consent have been filed with the Clerk of the Court.

"flows" to the designated facilities. *See*, "Forms of Flow Control" diagram at *Appendix* "B." Regulatory flow control, however, can best serve economic fairness and environmental interests.

3. The community's "bottled" local solid waste is then directed, via the flow control ordinances, through the neck of the bottle (the "bottleneck"[2]) to the Oneida-Herkimer citizens' public facilities for management and disposal. To the extent the community's solid waste can be completely disposed of locally, such as at the citizens' landfill or its recycling facilities (or if it still had one, a waste-to-energy facility), it has achieved a public interest objective mandated by New York and federal law.

4. To the extent the private sector has been employed to assist Respondents with their management of their community's local waste, there has never been favoritism. Any hauler from any State can compete for customers to collect local solid waste. As to disposal, and also its public infrastructure, if and when such services are needed (as has been the case in the past), any outside landfill or recycling plant operator, environmental educator, or material or parts supplier, or facility contractor can compete to provide goods, services or construction to Respondents. The annexed diagram depicts a comparison with other devices for directing waste flow, including the impermissible scheme used by the town in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). *See*, *Appendix* "C".

The Oneida-Herkimer system discriminates against no private sector vendors whatsoever. Nor is interstate commerce burdened, unless this Court deems waste itself as a protected article of commerce, something it declined to do in *Carbone*. *See, Appendix* "D".

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[2] The "bottleneck" visualization by the court below in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste*, 261 F.3d 245, 257 (2d Cir. 2001)("*United Haulers I*") was adopted from counsel's arguments.

SUMMARY OF ARGUMENT

Federal and state law allows the citizenry of Oneida and Herkimer counties, through their county government and State-created public benefit corporation, to monopolize the control and disposal of their own locally generated solid waste. The court below upheld this democratic principle, authorizing the citizenry, through the auspices of State, regional and local government, to "bottle up" locally generated waste into a public monopoly system, which monopoly system controls its citizens' waste, yet allows competition for local collection by haulers. The haulers are required to keep the trash within the system—the bottle—because the citizenry has the right to monopoly public service for its welfare and benefit.

This right to monopolize the processing and disposal of the citizenry's trash, by directing that local trash flow to the citizens' public facilities, paid for and maintained by the citizens' dollars, is a right which the citizens possess as a matter of self-governance and representative democracy. It is no different from creating a police or fire department, sewer district or public school system, to manage problems analogous to waste: crime, fire, sewage waste or illiteracy. The mere fact that the private sector may assist the local government in managing the local problems should not subject the public activity to dormant Commerce Clause scrutiny.

Yet Petitioners ask this Court to take its dormant Commerce Clause jurisprudence down an unprincipled and slippery slope, based upon the waste industry's purported right to ever increasing volumes of trash and profit. This is a path which, if taken, threatens our federalism, our democracy and our environment. The Constitution does not deny a local community the right to self-manage its own trash. This Court must not permit a collision between the Commerce Clause and bedrock constitutional principles of State sovereignty and democracy.

Your *amicus* requests that the Court apply the principled approach to solid waste management contained in counsel's law review article *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Solid Waste Management.*[3] Essentially, this approach applies the "Golden Rule" to garbage management—let the citizenry, through its representative government, seek to manage its own solid waste locally, such as through monopoly public service, but do not interfere with other communities' management if they choose to employ interstate waste service providers.

The respondent Oneida-Herkimer system is faithful to this principled approach. The Oneida-Herkimer system manages its citizens' solid waste locally to the maximum extent appropriate, and when the private sector is desired, it has been employed on a fair and non-discriminatory basis This principled approach to solid waste management adheres to federal environmental policy and this Court's jurisprudence. It is an approach suitable for international application.[4]

When State and local governments compete for the distinction of having the most environmentally sound and cost-effective solid waste management programs for their citizens' waste, this results in a cooperative and mutually beneficial "race to the top." On the other hand, granting the private waste industry the right to local citizens' trash is to put the "fox in charge of the henhouse." The likely result is an increase in "waste havens," excessive costs and environmental externalities to be borne by the public, and a "race to the bottom."

Because Respondents' constitutionally principled waste management results in no cognizable adverse affect upon any interstate commerce, the lower court must be affirmed.

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[3] *See, Diederich, Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Solid Waste Management,* 11 PACE ENVT'L L. REV. 157 (Fall 1993), hereinafter "*Does Garbage Have Standing.*"

[4] *See, id.*, at pp. 198-208.

ARGUMENT

POINT I
MONOPOLY PUBLIC CONTROL OF A COMMUNITY'S TRASH IS A CONSTITUTIONAL MEANS OF PROTECTING LOCALITIES THROUGHOUT THE NATION

A. The "Golden Rule" Applied to Municipal Management of Trash

Dormant Commerce Clause jurisprudence has as its core the "do unto others" philosophy of the Golden Rule applied to commerce among the States.[5] Respondents' public system applies this principle. If every municipality with trash responsibilities were to follow Respondents' example, by creating a comprehensive system for managing its own citizens' wastes, and dealing with the private sector on a fair and non-discriminatory basis when and if its services are needed, every community and the Nation would benefit.

The notion that such self-management and disposal of local solid waste might result in interstate trade wars, jealousies and protectionism is simply absurd. Communities will not retaliate if other communities self-manage their own citizens' wastes, nor will States, nor will foreign countries.[6] It is simply preposterous to believe that the citizens of Canada would "retaliate" by exporting less solid waste to New York State if New York State's communities exported less self-managed waste to Canada. More likely, all would regard this as in the public interest of both countries, as decreased trash volume means less inefficiency, with natural resources conserved and reduced environmental risks.

Self-management of waste is not protectionism. It is a better solution than Professor Tribe's suggestion that States simply exclude everyone from their landfills, and thus drive up disposal costs. He viewed this as one means to foster

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[5] The Commerce Clause, art. I, § 8, cl. 3 empowers Congress "To regulate Commerce ... among the several States...."

[6] *See generally, Does Garbage Have Standing, supra*, at pp. 197-208.

waste reduction because, he states, this Court has otherwise "tied us to the constitutional mast of our 'collective garbage,' when the barge is 'sinking'..." *See*, TRIBE, AMERICAN CONSTITUTIONAL LAW (3d Ed.) § 6-6 note 54.

Yet we Americans need not sink in our "collective garbage." *Cf., id.*, p. 1068. Consistent with the Golden rule, federal environmental policy disdaining waste, and a community's desire to manage citizens' solid waste and sanitation in a sound manner, communities may undertake waste management in a number of ways.

One way is to use a flow control ordinance to control and consolidate waste within a municipal system. This is neither revolutionary nor offensive. Flow control is merely one tool for directing waste flow. Another method is municipal collection, where a sanitation or public works department ("DPW") vehicles collect, for example, all of a city's trash. In the past, disposal was commonly at the city dump.[7] Another method of control would be the award of an exclusive franchise. *See, California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 305 (1905). Other economic and contractual tools can be used as well. *See Appendix "B."*

Whatever the method used, the goal is the same—the public welfare. As stated (but recently forgotten[8]) by the Sixth Circuit in *Hybud Equip. Co. v. City of Akron*:[9]

> "[C]ontrol of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to

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[7] *See generally*, WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHAEOLOGY OF GARBAGE 9 (1992).

[8] *Cf., National Solid Waste Management Association v. Daviess County*, 434 F.3d 898 (6th Cir. 2006). This case creates a split between the circuits at issue here.

[9] 654 F.2d 1187, 1192 (6th Cir. 1981), *vacated*, 455 U.S. 931, *cert. denied*, 471 U.S. 1004 (1985)

> state and local governments under the Tenth Amendment. . . . [and which ordinances] are rationally related to a matter of legitimate local concern."

This local police power is embodied into federal and New York State environmental law, favoring home rule over garbage. As Congress declared, "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies." *See*, Resource Conservation and Recovery Act ("RCRA") § 1001(a)(4), 42 U.S.C. § 6901(a)(4). Congress left responsibility for solid waste management with the States and their political subdivisions, and thus to government closest to the People.

Of course, the Golden Rule also permits a community to choose to do almost nothing at all. It can choose laissez-faire, and let its residents individually manage their own waste, such as by hiring a local trash collector. Unfortunately, the history of solid waste management is that less regulation means less oversight, more pollution, and sometimes the incursion of organized crime.

Respondents have chosen an intermediate path between total control and laissez faire, by creating a public system to maintain control over the citizens' waste and its disposal, while at the same time allowing a private sector role in collection. Respondents' citizenry has democratically chosen this means, as best for serving the public interest. The choice—monopolistic control of waste using flow control—is entitled to judicial deference.

B. The Right of the Citizenry to Monopoly Public Service Over Its Trash

1. Public monopolies are designed for the public interest

Public monopolies are a well tested method of providing a public service. There are many types of public monopolies, involving many types of public service.

The right of local government, on behalf of its citizens, to undertake monopoly public service authorized by the State is beyond dispute. Monopoly public service displaces competition, yet it violates neither the federal antitrust laws nor the dormant Commerce Clause. *See*, *Parker v. Brown*, 317 U.S. 341 (1943). The legislature of the State of New York affirmatively granted Respondents' citizens the right to monopoly public service. *See*, N.Y. Public Authority Law § 2049-ee(7). Monopoly control over solid waste is properly viewed as providing a vital public service. This is especially true as to waste. Unlike a water, telephone or electric utility, the goal is elimination, not production. There can be no "net profit."

A community has the right to control its waste, just as the city in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) had the right to control sewerage within its authorized territory, and even more so than the State of California had in controlling growers' raisins (a product) in *Parker*. Public monopoly is proper and constitutionally permissible.

"Hands on" public sector management of waste is consistent with fundamental principles of environmental law,[10] especially the "proximity principle" that pollution is best managed closest to its source. Local public sector management of solid waste is also consistent with the principle of subsidiarity,[11] a concept implicit in the Tenth Amendment, that governance is best achieved at the appropriate level closest to the people.

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[10] Professor Phillip Sands identifies three fundamental environmental law principles: (1) the Polluter Pays principle; (2) the Precautionary principle; and (3) the Proximity principle. The Oneida-Herkimer system advances each principle. The hauler Petitioners' vision advances none. *See*, SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION (2d ed. 2003).

[11] For a brief general discussion, see *Wikipedia, The Free Encyclopedia*, at http://en.wikipedia.org/wiki/Subsidiarity. *See also, Does Garbage Have Standing, supra*, at 165 n. 21, 202, n. 185 and 203 and accompanying text.

Yet public monopolistic control need not include denial of private sector involvement.

2. *Monopoly public control can include the private sector*

As to waste which citizens voluntarily place curbside, only the Oneida-Herkimer system, and no other individual or entity, has an entitlement. The Oneida-Herkimer citizens place waste curbside for their government to manage through the public system. The citizens have democratically chosen this exclusively local management. The system maintains monopolistic control of local solid waste, and the right to possess it.

The system could permissibly displace the private sector entirely, including the petitioning haulers here. However, there is no need. As argued in Point II (C) below, these haulers, often "mom and pop" businesses, are obliged by the flow control laws to respect the public system. The trash collectors gain no "title" to the trash. Their possession of the trash is a constructive bailment.

Because the Oneida-Herkimer carters are never entitled to the trash within a monopoly public system, such a system does not discriminate against, nor burden,[12] nor even involve, interstate commerce.

There are much broader implications. If carters become entitled to citizens' trash merely by collecting it, then large

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[12] Where government regulation involves burdening commerce, this Court applies a balancing test. *See, Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under this test, reasonable regulation of solid waste will be upheld. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462, 470-74 (1981), where the Court applied the *Pike* balancing test to sustain a state law banning the retail sale of milk in plastic non-returnable containers (thus favoring local industry), after balancing its burden on interstate commerce against the purposes of the law—to promote resource conservation, to ease solid waste disposal problems and to conserve energy.

cities which currently use DPW collection to bring trash to city disposal and recycling facilities could not privatize collection without risking non-use of the public facilities. This is counter intuitive, unreasonably ties the public's hands, and undercuts democracy.

3. *Monopolistic public control of local waste does not implicate interstate commerce*—Clason v Indiana

This Court's solid waste jurisprudence supports the view that local management of municipal solid waste does not implicate the dormant Commerce Clause. Where waste is not tendered to the private sector but remains within a municipal system, local control has been upheld. Thus, in *California Reduction Co., supra*, the Court approved a garbage franchise by allowing San Francisco to award an exclusive franchise for waste collection and disposal at a city-designated site. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Supreme Court allowed a city's monopolization of sewerage waste, including tying arrangements with local collectors.

And, in a case which this Court may view as controlling precedent, *Clason v. Indiana*, 306 U.S. 439 (1939), the Court upheld against a dormant Commerce Clause challenge a flow control law directing private haulers of dead animals (one type of solid waste) to a designated disposal facility. In upholding the challenged local law, the Court stated:

> "[T]he mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people."

Id., 306 U.S., at 444.

As in the present case, the local law in *Clason* did not discriminate in favor of or against in-state or out-of-state haulers, but merely accomplished a valid governmental objective. *Clason* involved only a small segment of municipal solid waste, dead animals. Yet for Commerce

Clause purposes, Respondents' comprehensive system likewise involves "reasonable measure[s] designed to secure the health and comfort of their people." *Id.*

4. Entrepreneurial municipalities are entitled to become waste havens

The converse of monopoly public service is free competition. If a business, or a government acting as a profit-making enterprise (e.g., Sussex and Charles City counties in rural southwest Virginia, *amici* for Petitioners herein), wish to invest in building waste disposal capacity, and offering such to communities needing disposal options (such as New York City), this is their choice. *Philadelphia* will protect such free enterprise. Such entities located here or overseas can seek to become waste havens, and profit on other communities inability to manage local trash.

Offering to provide services to help municipalities is one thing. It is quite different to seek to prevent municipalities from engaging in self-help. Petitioners ask this Court to compel the use of the private sector, by impairing municipalities' right to self-manage their own citizens' wastes in the first instance. Petitioners' argument suggests compelled privatization of solid waste management.

5. Discriminatory governmental mischief is not protected—Carbone & Philadelphia

If waste is tendered to the private sector for disposal or other management, it should be tendered to the interstate waste service marketplace on an evenhanded nondiscriminatory basis. *See, e.g., Houlton Citizen's Coalition v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3rd Cir. 1995), *cert. denied* 516 U.S. 1173 (1996). Respondents do this. They hire based upon merit, not geography. This "full and open competition" places no burden upon, nor discrimination against, interstate commerce in any respect.[13] Oneida-Herkimer carters can compete

freely, within the local waste collection bottle, and have no property interest in the people's trash.

On the other hand, an improperly motivated monopoly, such as one involving a conspiracy to provide excessive profits to a local business (not present, but cautioned against, in *Parker*[14]), or as in *Carbone*, stealing a competitor's out-of-state waste trade to favor a local business, is impermissible. It is municipal mischief.

Carbone involved a town's *ad hoc* financial scheme to opportunistically favor of a local private vendor, even to the extent of allowing it to grab its competitor's New Jersey trash. This was not done pursuant to any authorized solid waste management plan.[15] The town did not even attempt to show that it had an authorized *Parker*-sanctioned public monopoly. The federal district court[16] recognized the mischief, while the state courts did not. *Carbone* had nothing to do with public monopoly and sound, even-handed, comprehensive solid waste management. The town abused its governmental power to favor a local private company, grabbing interstate business, for a short-term financial fix. This was local government mischief, not principled waste management.

Similarly, State and local governments have no right to intrude with the operation of the interstate market in waste management services. Such would violate the Golden Rule (and *Philadelphia* and its progeny[17]) by denying needy communities, such as New York City, the option of using the

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[14] 317 U.S., at 352-53 ("... we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade....")

[15] The County of Rockland was the regional planning unit, not the town.

[16] *C & A Carbone v. Town of Clarkstown*, 770 F.Supp.848, 855 (S.D.N.Y. 1991).

[17] *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992); *Oregon Waste Services v. Department of Environmental Quality*, 511 U.S. 93 (1994).

interstate waste businesses to help move their clients' trash to, say, a private New Jersey or Michigan landfill. Importation barriers at State lines constitute discrimination.

Local grabs for local business, or importation barriers to favor a State, are protectionist, discriminatory to the outsider and invite resentment. These are constitutionally impermissible governmental misconduct. These are totally unlike public self-management of local trash—democratically chosen community housekeeping.

POINT II
PUBLIC MANAGEMENT LOCAL TRASH DOES NOT IMPLICATE INTERSTATE COMMERCE

Local public waste management does not implicate the dormant Commerce Clause. The annexed diagrams are designed to simplify the concept. *Appendix* "A" shows how local waste is kept and managed within the Oneida-Herkimer system's "bottle" of public control until delivered to the public facilities. Interstate commerce is involved only if Respondents seek the waste disposal services of the outside private sector as to waste which it cannot manage itself. *Appendix* "C" depicts various permissible and impermissible flows of municipal waste. *Appendix* "D" depicts Oneida-Herkimer system waste flow, including its potential choice of employing, to some degree, the outside private sector for disposal services.

A. Waste is not an "article of commerce"

For purposes of dormant Commerce Clause analysis, it warrants repeating that waste itself is not an "article of commerce." The "commerce" involved in dormant Commerce Clause cases involving solid waste is the service of handling and disposing of the trash, not the trash itself.[18]

This makes sense. The municipal solid waste involved, like other species of solid waste (hazardous, medical,

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[18] *See, Carbone, 511 U.S., at 391; Does Garbage Have Standing,* at 158.

nuclear), are pollution, not product. One does not pay for waste, but rather pays to get rid of it. It has negative value, and is best never created. Federal policy is to minimize its creation.[19] Less waste means more economic efficiency. This Court has approved State law encouraging waste reduction. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473, n. 17 (1981)(waste reduction as a proper goal of the Minnesota's ban on plastic non-returnable milk containers.)

B. Reducing or Eradicating Waste Does Not Impair Commerce

Petitioners' argument is that waste creation creates commerce, and that waste eradication through, say, sound local disposal, interferes with such commerce. This is specious.

No one pays for anyone else to create waste. It is not a goal of manufacture. Like other forms of waste, solid waste is an unwanted and unhealthy byproduct. If waste could be eliminated, it would benefit society just as would the elimination of crime, fire, poverty, disease and illiteracy. The waste industry has no legitimate complaint. The dormant aspect of the Commerce Clause offers no protection for unwanted blights, whether crime, fire, illiteracy or solid waste.

This Court has long endorsed the notion that a City can manage its own waste itself. *California Reduction Co., supra.* It long ago upheld a flow control law allowing municipal control of solid waste. *Clason, supra.* And this Court has upheld a statute serving Minnesota's interests in conserving resources and reducing solid waste. *Clover Leaf Creamery, supra.* A ruling by this Court holding that state

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[19] *See*, Resource Conservation and Recovery Act ("RCRA") § 1001(a)(4), 42 U.S.C. § 6901(a)(4) ("leadership ... to reduce the amount of waste and unsalvageable materials and provide for proper and economical solid waste disposal practices."); U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* 11 (Feb. 1989).

and local government cannot reduce and eliminate local waste will jeopardize sound precedent.

Petitioners do not dispute that a municipality can permissibly dispose of trash locally, and completely, through recycling, composting, landfilling or, if it were deemed by the citizenry appropriate, waste to energy incineration. If truly an "article of commerce," such destruction would be abhorrent.

C. Public Sanitation trucks or private trucks make no constitutional difference

It makes sense that a community's exclusively public self-management of local waste is constitutionally permissible, but no sense that the dormant Commerce Clause is suddenly activated if local haulers place their hands on it. The public can permissibly eradicate its own trash using DPW collection and disposal. Allowing non-exclusive private collection within a public system should not compel a different result.[20]

No constitutional distinction should be made between citizens paying taxes for DPW trucks to bring their trash to their public facilities, and citizens paying their waste carter directly for this service. The only economic difference between flow controlled and municipally-sponsored collection is the method of paying the trash collector—municipal taxes versus private invoices. From the customers' perspective, flow control results in payment in direct relation to waste collection needs, and recycling effort. It is fairer allocation of cost than to tax for DPW collection. It encourages waste reduction, reuse and recycling.

Within the "local collection bottle" all carters find a level playing field. All contribute a portion of collection proceeds as "tip fees" to support the public system. If any were

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[20] An award of an exclusive franchise for waste collection could be used. *California Reduction*. The Oneida-Herkimer system can be viewed as a non-exclusive franchise.

permitted to avoid the public disposal and pocket the tip fee, all other carters and the citizens' pubic system are damaged. And if all carters could avoid the public system, then the citizens would be forced to pay twice—the carter bills and tax bills.

D. The trash collectors' possession of the local citizens' trash is a constructive bailment, with no claim of title

The carters here claim an entitlement to the waste they possess. However, citizens do not give "title" to their trash to their haulers, nor could they permissibly do so, because under the flow control laws at issue, the community's trash must be directed to, and thereby becomes the property of, the citizens' representatives, their local government and waste authority.

Upon picking up curbside waste, the haulers' possession is a constructive bailment, as the flow control law and public monopoly system imposes upon the haulers the legal obligation to deliver the bailed waste to the public facilities. *See generally*, 9 N.Y.JUR.2d, *Bailments & Chattel Leases,* §§ 5 & 27. Essentially, there is an "implied by law" agreement between the local residents and the haulers that the hauler's lawful possession of waste is conditioned upon the requirement of delivery to the citizens' public system. The carters are mere bailees, with no property entitlement to the citizenry's and its government's trash.

The plaintiff interstate operator in *Carbone* could fairly be said to hold rightful "title" to the waste in its possession (especially from its out-of-state customers). The New Jersey residents never voted to allow a New York jurisdiction to control their trash. In contrast, the Oneida-Herkimer citizenry did just that. They voted, through their elected representatives, to keep their trash within their own public system. They voted for a system where their waste collectors gained only temporary possession, never a permanent right of possession, or title. The Oneida-

Herkimer citizens, through their flow control ordinances and their placing waste curbside, made their carters mere bailees.

If there is any doubt on the public's possessory right to its waste, this Court has instructed in *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 435-36 (1951), that:

> "As a broad principle of jurisprudence ... a state... may use its legislative power to dispose of property within its reach, belonging to unknown persons. Such property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations. (*emphasis added; footnote omitted*).

State law defines property rights. Under the common law of bailment, and the State and local law empowering Respondents' monopoly control of waste, the solid waste at issue belongs to the citizens and their public monopoly, not the haulers.[21]

The Court can decide this case in favor of Respondents on this basis alone. The Respondents' citizenry directed its waste be brought to its public facilities, by enacting the system. The citizens further support their democracy by voluntarily placing their trash curbside. Petitioners possess only a constructive bailment, which disposes of their argument that they have a commercial right to abscond with the citizens' trash.

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[21] Waste carters and their industry should not have standing to assert rights to trash owned by the local citizenry and their governmental representatives. *See, Dennis v. Higgins*, 498 U.S. 439, 461 (1991) (Kennedy, J., dissenting). Their argument is analogous to allowing a private bus company a constitutional entitlement to bring schoolchildren which it picks up to a school of the bus company's choice. The public school system and parents have legal control of the children, just as the public waste system (and the residents) retain legal control to the waste under the constructive bailment resulting from the local flow control laws.

E. The public system properly includes the monopolistic "bottling" of the local citizenry's trash

Whether a bailment or not, there is no "commerce" in the local waste, and certainly no interstate commerce. *Parker v Brown* makes clear that the commodity—in that case raisins—managed within a public service monopoly is not yet in interstate commerce.[22] The States retain, said Chief Justice Stone, "the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."[23]

This is even more true with local waste than with growers' raisins. In the present case, the citizenry has, through the operation of representative democracy, agreed that their waste must be brought to their public facilities for management, recycling, and otherwise proper disposal. This epitomizes democratic decisionmaking, and local responsibility. The Oneida-Herkimer citizens' pay for this democratically created, State-approved, RCRA-compliant comprehensive solid waste management system. It is their trash, their dollars, and their system.

The carters' claim to entitlement is merely that they temporarily possess the citizens' and public system's trash.

POINT III

FEDERALISM, THE TENTH AMENDMENT, AND THE GUARANTEE CLAUSE PROMISE DEMOCRACY OVER TRASH

A. Congress is without affirmative Commerce Clause power to prevent local public management of local waste

A plausible argument can be made that Congress would be acting in excess of its Commerce Clause powers if it attempted to enact legislation preventing local government from managing its own citizens' waste. Public solid waste management and sanitation is a paradigmatic example of

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[22] *Parker, supra*, 317 U.S., at 360-61.

[23] Id. at 360.

state and local government exercise of its traditional local police power. *See, Hybud, supra.* Reducing or even eliminating local solid waste has no adverse impact upon interstate commerce. It certainly has less adverse impact on commerce than reducing the number of handguns near schoolchildren, or reducing domestic violence interfering with the lives of women. *Cf.*, *United States v Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Those guns and violence were beyond federal power. So too should local waste management of local trash.

Of course, this Court has granted Congress considerable leeway regarding the scope of its powers under the affirmative Commerce Clause. As set forth in *Garcia*,[24] the structure of the national government will ordinarily safeguard state and local governments, and principles of federalism, against excessive intrusion from the federal Congress.

However, there is no similar political protection when this Court exercises, as an unelected body, its judicial prerogative to infer congressional intent under the "dormant" aspect of the Commerce Clause. The exercise of such judicial prerogative is certainly appropriate when a state or local government is found to have regulated in a manner which is discriminatory against out-of-state commercial interests, or which unduly burdens interstate commerce. This Court correctly saw protectionism, favoritism and discrimination against interstate commerce in *Carbone*, and thus properly held that the dormant Commerce Clause was violated.

However, this case is entirely different. Here, an entirely local governmental activity is engaged in solving a local problem in a manner which involves rational democratic choice, prudent for the community's long-term economic and environmental welfare, consistent with federal environmental law and internationally accepted

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[24] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

environmental norms. There is no discrimination against any other community or State. The state legislature authorized monopoly public service to achieve results which, if duplicated nationally, would help solve the Nation's solid waste problems. The local people pay for the local system.

Based upon the above, if Congress enacted a law stating that the waste industry is entitled to local citizens' trash, this Court should hold such unconstitutional as beyond its Commerce Clause reach. The federal government is limited to its enumerated powers, and the Commerce Clause does not give it unrestrained power. *See*, *Lopez*, 514 U.S., at 556-57, 563-68; *Morrison*, 529 U.S., 607-08, 613-19. Local waste, which is incinerated, landfilled or otherwise disposed of locally is certainly not "commerce" that flows "among the states." *Lopez*, 514 U.S., at 556-68; *Morrison*, 529 U.S., 610-18.

Thus, this Court must not grant the waste industry indirectly, under the dormant Commerce Clause, that which Congress could not grant under its affirmative power.

B. This Court implicitly recognized in *Carbone* that the citizenry can publicly manage waste

This case involves facts that are almost exactly the opposite of, and profoundly different from, those reviewed in *Carbone*. As argued above, the town employed its governmental power in an *ad hoc* fashion in order to favor a local vendor, who happened also to be stealing its competitor's out of state waste trade.

It appears this Court's internal debate was whether the town-sponsored local business was merely a favored local business, and thus discrimination under this Court's longstanding "local grab" jurisprudence,[25] or whether, according to the dissent, it was "essentially an agent for the municipal government" thus authorized monopolistic

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[25] *See, e.g., Minnesota v. Barber*, 136 U.S. 313 (1890); *Carbone, supra*, 511 U.S., at 391.

conduct. *Id.*, at 416, 424-25. The majority did not view the Town's "single local proprietor" as governmental. *Id.*, at 392. As stated by Justice Kennedy:

> "The essential vice in laws of this sort is that they bar the import of the processing service. Out-of-state [businesses] are deprived of access to local demand for their services. Put another way, the offending local laws hoard a local resource ... for the benefit of local businesses ...." (*emphasis added*).

Id., at 392.

The bare majority[26] in *Carbone* found "[d]iscrimination in favor of local business." *Id.* Justice Kennedy concluded his majority decision by summarizing that: "State and local governments may not use their regulatory power to favor local enterprise...." *Id.*, at 394 (*emphasis added*).

The monopoly public service involved in the present case is not an "enterprise." It is public service. It favors no local business whatsoever. It cannot even fairly be said to favor itself, as the local citizenry itself pays for everything—the haulers and the public system, "on the back" of no one else.

C. Democracy will suffer an arctic chill, if a Citizenry cannot govern its local concerns

The Guarantee Clause[27] promises a "republican form of government" to the People. Yet if the People, through their representatives, cannot control their citizens' own wastes, under Petitioners' profit-making vision of the dormant Commerce Clause, what can they control? Local communities self-manage crime, fire, social services, public health and public education. These are essential, traditional

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[26] In her concurrence, Justice O'Connor disagreed with the majority's conclusion that the Clarkstown flow control laws discriminated against commerce. 511 U.S., at 401, 405. She certainly would have found no discrimination with the Oneida-Herkimer system.

[27] U.S. Constit., article 4, § 4.

activities of local government.[28] If granting the private sector a small role in any of these other versions of monopoly public service can result in potential Commerce Clause liability, then State and local democracy is seriously imperiled. As this Court observed in *Fry v. United States*, 421 U.S. 542 (1975):

> "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[29]

And as Professor Lawrence Tribe cautions:

> "The most fundamental threats to state sovereignty ... [are] federal laws that restructure the basic institutional design of the system a state's people choose for governing themselves ... an assault on those 'democratic processes through [which] ... citizens ... retain the power to govern ... their local problems.'"[30]

Petitioners ask this Court to ignore State and local democratic process used to create the Oneida-Herkimer system. As recognized by this Court in *New York v. United States*,[31] a case involving a different species of waste, nuclear waste:

> "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local

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[28] *See, National League of Cities v. Usery*, 426 U.S. 833, 854 (1976) (examples of traditional government functions are fire prevention, police protection, sanitation, hospital services and education), *overruled by Garcia, supra.*)(*emphasis added*)

[29] 421 U.S., at 547 n.7 (1975).

[30] *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 397 (2d ed. 1988), quoting *FERC v. Mississippi*, 456 U.S. 742, 790 (J. O'Connor).

[31] New York v. United States, 505 U.S. 144, 169 (1992).

> electorate in matters not preempted by federal regulation."

This Court must allow New York State and Oneida-Herkimer citizens their democracy. The Oneida-Herkimer system, if permitted to continue to operate, is a system which may become an exemplary model for the country, and perhaps even the world. It is, in some ways, an experiment—and precisely the type of State-sponsored laboratory which this Court has long endorsed under principles of federalism.[32] *See, e.g., Garcia, supra,* 469 U.S., at 546 ("The science of government ... is the science of experiment."). The Oneida-Herkimer community has made plans for its solid waste future. If disposal sites dry up in the future, or transportation costs become exorbitant, or if the Nation requires more aggressive waste reduction and recycling in the future, Oneida and Herkimer counties will be prepared. The Congress, when it enacted subtitle D of RCRA, the federal provisions for municipal solid waste management, could not have envisioned a better model than the one under scrutiny here.

Respondents have described the economic and environmental benefits of their public system. The Petitioners, on the other hand, assert that their approach is economically better. The relevant factor, however, is that the State and local citizenry have democratically authorized this experiment in exemplary local waste management. Because the dormant Commerce Clause is designed to ensure national solidarity, not necessarily economic efficiency,[33] the economic merits of the argument must defer to the democratic choice, especially where, as here, it is the local citizenry's dollars which pay for their public system.

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[32] For a discussion of States as laboratories of experiment, *see, Does Garbage Have Standing,* at pp. 221-226.

[33] *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935); TRIBE (3d ed.), *supra,* at p. 1057. *See also, Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127 (1978)(Commerce Clause does not protect the particular structure or methods of operation of a market.)

If the Oneida Herkimer model is invalidated, the citizens of this relatively small community will likely be required to pay damages and the costs of this litigation under 42 U.S.C. § 1988. *See, Dennis v. Higgins*, 498 U.S. 439 (1991). Though unfortunate for this community, the injury to the general public and the Nation will be much more profound, because it will blow an arctic wind over other localities thinking about experimenting with new public waste management strategies using flow control.

Subjecting local governments to "Pike balancing" also stifles local democracy. How many localities will be willing to democratically create a system knowing that a federal court may invalidate it after "balancing." The Court can avoid these chills upon local democracy, by applying the constitutionally principled approach to waste management argued above.

CONCLUSION

The Oneida-Herkimer system is worthy of nationwide emulation, not judicial abolition, and its citizens are entitled to their democracy. Your *amicus* Federation urges that the court below be affirmed.

Respectfully submitted,

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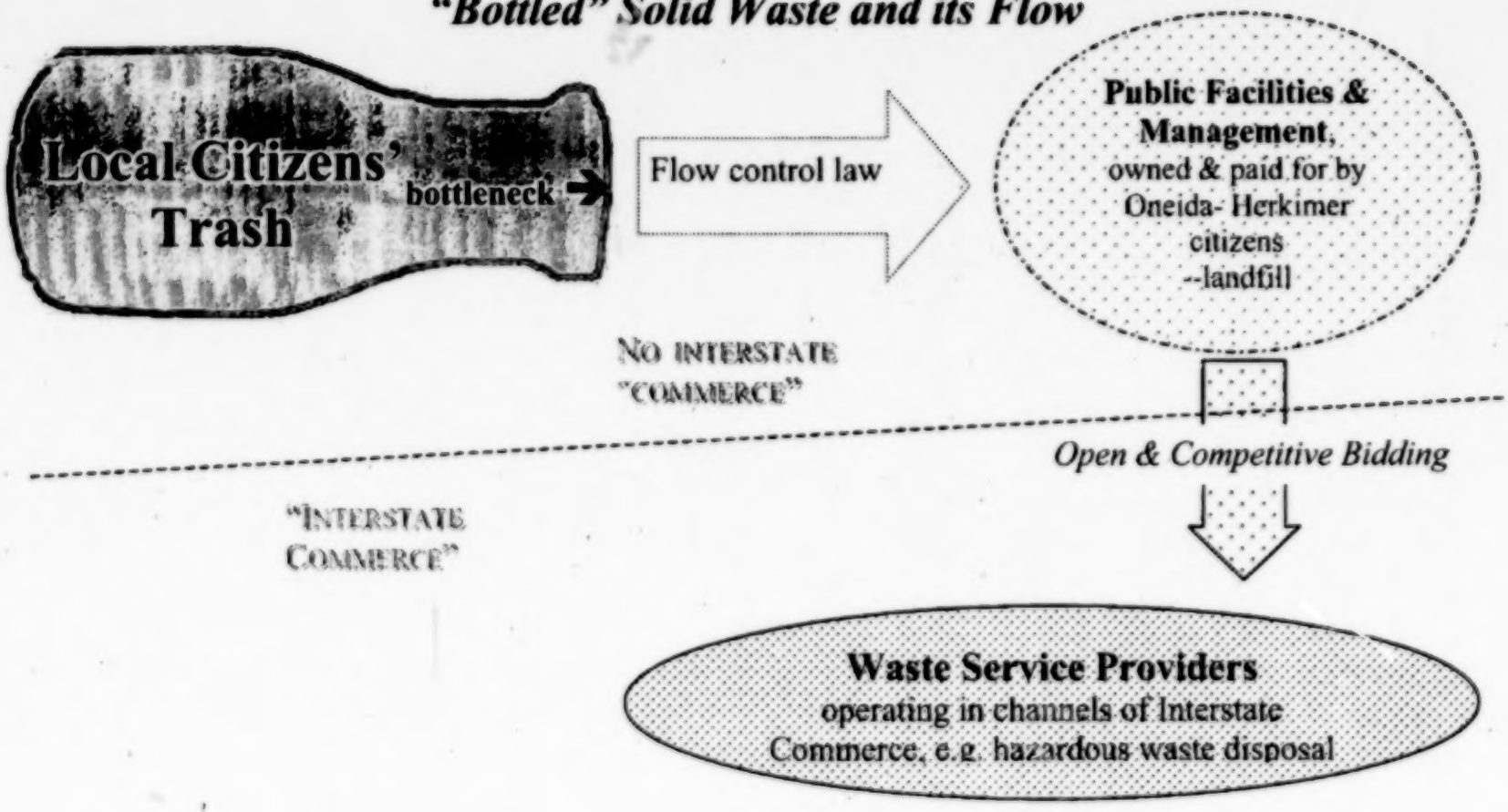
"Bottled" Solid Waste and its Flow



Appendix "A"

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Appendix "B"

Various Methods of "Flow Control"

The direction or "flow control" of waste to designated treatment or disposal facilities can be accomplished through various means:

- municipal collection, by sanitation department garbage trucks,
- "economic flow control," using financial incentive (such as offering free or subsidized delivery/disposal options),
- "contractual flow control," such as through award of a public franchise
- regulatory flow control (using an ordinance or other law).

The flow can be directed to either a public system, or to a private waste facility. Absent fair and open competition, flow control to a private entity may discriminate against or burden commerce.

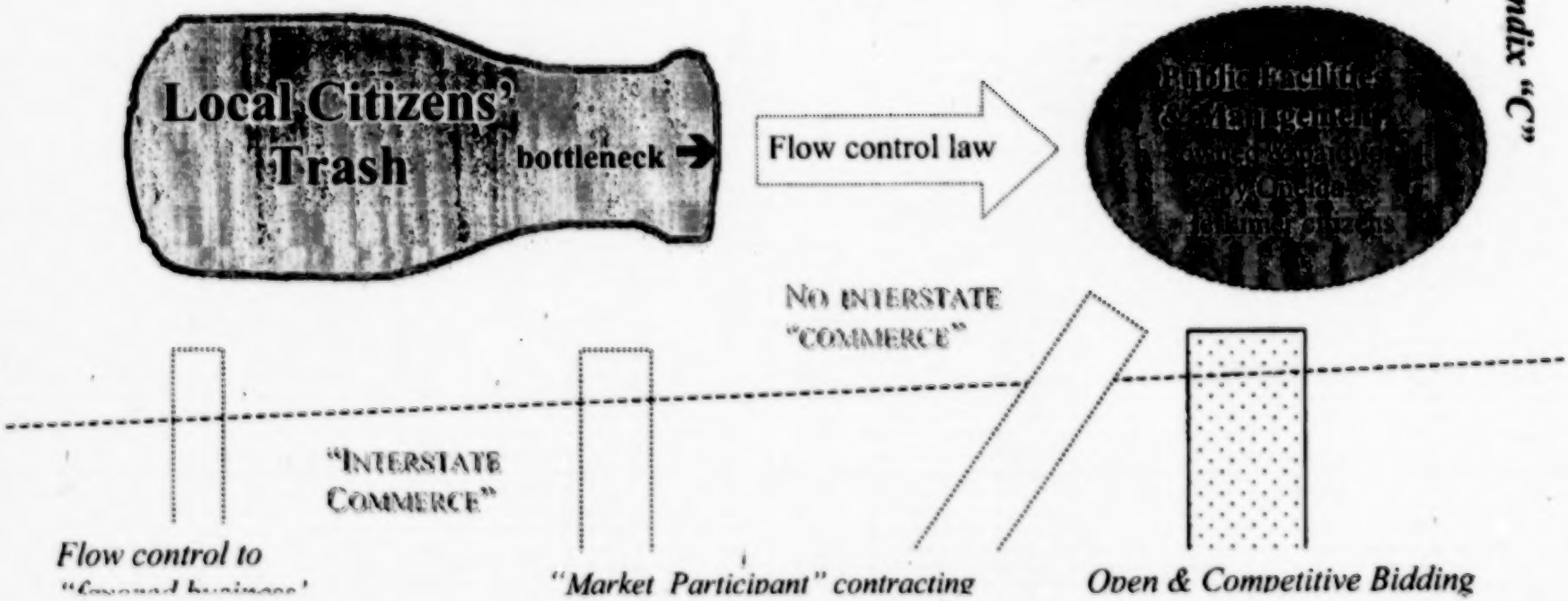
Appendix "B"

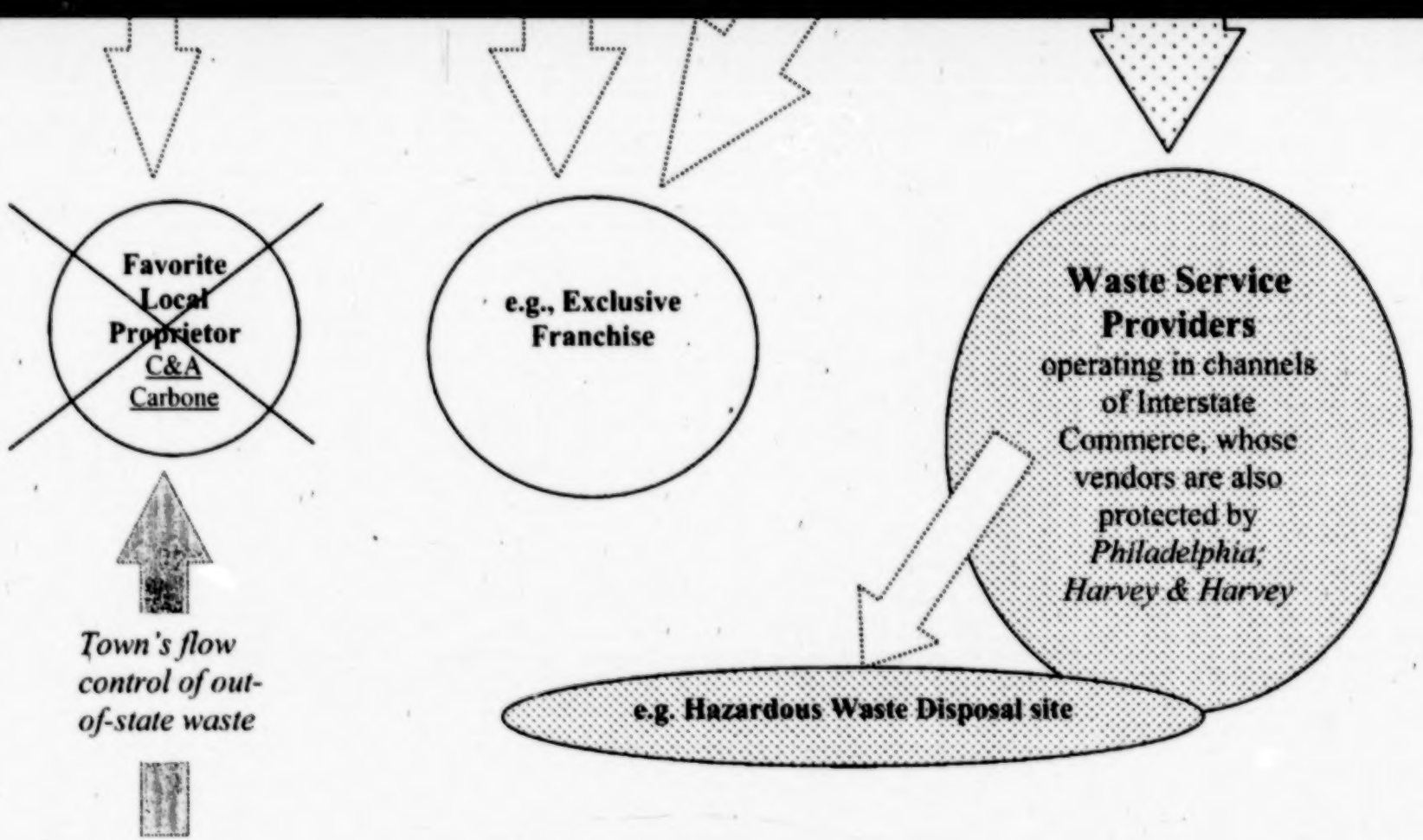
Diagram of Methods of Flow Control

Solid Waste
Municipal public works collection
Contractual flow control – franchise
Economic flow control, e.g., free delivery
Regulatory flow control via ordinance
"Designated Facilities"

Appendix "C"

Possible flow of Solid Waste




Favorite Local Proprietor
C&A
Carbone
e.g., Exclusive Franchise
Waste Service Providers
operating in channels of Interstate Commerce, whose vendors are also protected by
Philadelphia; Harvey & Harvey
e.g. Hazardous Waste Disposal site
Town's flow control of out-of-state waste

Oneida-Herkimer Waste Flow Diagram